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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/730,709

12/08/2003

Alessandro Luigi Spadini

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UNILEVER INTELLECTUAL PROPERTY GROUP  
700 SYLVAN AVENUE,  
BLDG C2 SOUTH  
ENGLEWOOD CLIFFS, NJ 07632-3100

EXAMINER

ROBERTS, LEZAH

ART UNIT

PAPER NUMBER

1614

MAIL DATE

DELIVERY MODE

07/02/2007

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

**Office Action Summary**

Application No.

10/730,709

Applicant(s)

SPADINI ET AL.

Examiner

Lezah W. Roberts

Art Unit

1614

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 11 April 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) 16-17, 19 and 20 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-15 and 18 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date <u>A-B</u> . | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Election of Species***

The previous Election of Species Requirement has been vacated and the following requirement has been made.

This application contains claims directed to the following patentably distinct species: 1) a stabilizer; 2) a valve; 3) a first component and 4) a type of composition.

The species are independent or distinct because the stabilizers recited by the instant claims have different structures and properties, e.g., polysaccharides have divergent functions from organophilic silica and may be used in foods such as ice cream. In regards to valves, they have different mechanisms of action to deliver the desired material. In regards to the first component, they all have divergent structures and functions and have different stabilities.

Applicant is required under 35 U.S.C. 121 to elect a single disclosed species for 1, 2, 3 and 4 for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, claim 1 is generic.

Applicant is advised that a reply to this requirement must include an identification of the species that is elected consonant with this requirement, and a listing of all claims readable thereon, including any claims subsequently added. An argument that a claim is allowable or that all claims are generic is considered nonresponsive unless accompanied by an election.

Upon the allowance of a generic claim, applicant will be entitled to consideration of claims to additional species which depend from or otherwise require all the limitations of an allowable generic claim as provided by 37 CFR 1.141. If claims are added after the election, applicant must indicate which are readable upon the elected species.

MPEP § 809.02(a).

Applicant is advised that the reply to this requirement to be complete must include (i) an election of a species or invention to be examined even though the requirement be traversed (37 CFR 1.143) and (ii) identification of the claims encompassing the elected invention.

The election of an invention or species may be made with or without traverse. To reserve a right to petition, the election must be made with traverse. If the reply does not distinctly and specifically point out supposed errors in the restriction requirement, the election shall be treated as an election without traverse.

Should applicant traverse on the ground that the inventions or species are not patentably distinct, applicant should submit evidence or identify such evidence now of record showing the inventions or species to be obvious variants or clearly admit on the record that this is the case. In either instance, if the examiner finds one of the inventions unpatentable over the prior art, the evidence or admission may be used in a rejection under 35 U.S.C.103(a) of the other invention.

Applicant is reminded that upon the cancellation of claims to a non-elected invention, the inventorship must be amended in compliance with 37 CFR 1.48(b) if one or more of the currently named inventors is no longer an inventor of at least one claim

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remaining in the application. Any amendment of inventorship must be accompanied by a request under 37 CFR 1.48(b) and by the fee required under 37 CFR 1.17(i).

During a telephone conversation with Alan A. Bornstein on June 15, 2007 a provisional election was made with traverse to prosecute the invention of a waxy material for a stabilizer, a duckbill valve, a skin care product and sodium bicarbonate first component, claims 1-15 and 18. Affirmation of this election must be made by applicant in replying to this Office action. Claims 16-17 and 19-20 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

### ***Claims***

#### **Claim Rejections - 35 USC § 112**

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-15 and 18 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The instant claims are indefinite insofar as the basis for the percent calculation is not set forth, e.g., percent by weight based on the total weight of the composition, percent by volume based on the volume of the carrier, etc. See Honeywell Intl. v. Intl.

Trade Commn., 341 F.3d 1332, 1340 (Fed. Cir. 2003). The percent calculation must either be clearly defined within the specification or set forth within the claim.

**Claim Rejections - 35 USC § 102 - Anticipation**

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

1) Claims 1-4, 7, 10-11 and 13 are rejected under 35 U.S.C. 102(b) as being anticipated by Schmitt (3,866,800).

Schmitt discloses a non-pressurized packaged product comprising a self-heating product that may be used for hair or skin. The product comprises a two compositions system wherein one composition comprises an oxidant and the second a reductant (see Abstract). The oxidant compositions include water and may or may not include a stabilizer (col. 2, lines 32-40). The second composition is a nonaqueous composition comprising a reductant, a surfactant such as an anionic surfactant and an organic solvent such as polyoxyalkylene glycol. The second composition may also comprise stabilizers, thickening agents and suspending agents (col. 3). When the compositions are mixed, they form a gas. The compositions come in a dual chamber container that keeps them separate from one another. The containers have ball valves, which lead to chamber where the two compositions are mixed and then released from the tube (see

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Figures). The reference anticipates the instant claims insofar as it discloses a packaged product comprising a stabilizer, an anionic surfactant, an anhydrous carrier, a first component and a second component that when the two components are mixed a gas is released..

2) Claims 1, 12-13, 15 and 18 are rejected under 35 U.S.C. 102(b) as being anticipated by Murphy (US 5,585,093).

Murphy discloses cosmetic deodorant compositions comprising encapsulated sodium bicarbonate. The bicarbonate has a particle size ranging from 5 to 150 microns. Other ingredients include volatile oils, low melting waxes and surfactants including anionic surfactants (col. 4, lines 44-47 and col. 6, lines 50-55). The surfactant comprises 1 to 3% by weight of the composition (col. 5, line 7). The compositions do not comprise water. The compositions are delivered to cosmetic containers (col. 8, lines 14-16). The second chamber is optional therefore the claims encompass a container. The reference anticipates the instant claims insofar as it discloses a packaged product comprising a stabilizer, an anionic surfactant, an anhydrous carrier and a first component that is unsolvated by the carrier.

3) Claims 1, 9-10 and 13-15 are rejected under 35 U.S.C. 102(b) as being anticipated by Sine et al. (US 6,183,766).

Sine et al. disclose skin-sanitizing compositions. The compositions comprise surfactants including anionic surfactants having a concentration from about 0.1% to

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about 5%. A degreasing agent is used and includes wax materials and clays, which have particle sizes ranging from 0.01 microns to about 100 microns (col. 7, lines 20-64), encompassing claims 14-15. Water may comprise 0 to 60% of the compositions therefore the carrier may be anhydrous (col. 2, line 16). Odor controlling agents include bicarbonate salts (col. 9, lines 59-62), which is the elected species therefore is capable of reacting with a second component different from the first as recited in the instant claims. The compositions are stored in a dispensing container such as a spray dispenser (col. 17, lines 59-60). The reference anticipates the claims insofar as it discloses a packaged product in a container with a pump comprising a stabilizer, an anionic surfactant, an anhydrous carrier and a first component that is unsolvated by the carrier.

**Claim Rejections - 35 USC § 103 - Obviousness**

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.



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4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

1) Claims 1-4, 7, 13 and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lentini et al. (US 6,177,092).

Lentini et al. disclose self-foaming cleansing systems. The cleansing systems may be anhydrous. The anhydrous compositions are added to water to produce an effervescent effect composition. One component comprises a bicarbonate component (col. 3, lines 39-53). Surfactants used include anionic surfactants and comprise no more than 20% of the compositions (col. 5, line 62 to col. 6, line 30). Other components include polysorbate 20 and PPG-5-Ceteth-20 (see Example), which is a type polyalkylene ether, encompassing the instant claims. The second component includes an acid. The two reactive components can be dispensed from physically separate packages or from a unitary package with chambers. The components of either type of packages can be applied simultaneously or substantially simultaneously to the skin,

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where they commingle and react (col. 2, lines 17-30). The reference differs from the instant claims insofar as it does not disclose a specific example of a nonaqueous component in combination with an aqueous component.

The reference is not anticipatory insofar as one must "pick and choose" from different types of compositions. That being said, it would have been obvious in a self-evident manner to have combined a nonaqueous composition with a an aqueous compositions, motivated by the unambiguous disclosure of each individually, and consistent with the basic principle of patent prosecution that a reference should be considered as expansively as is reasonable in determining the full scope of the contents within its four corners.

2) Claims 10-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lentini et al. (US 6,177,092) in view of Gentile et al. (US 6,161,729).

The primary reference is discussed above. The reference differs from the instant claims insofar as it does not disclose the type of valves or specific types of bottle used to store and deliver the compositions.

Gentile et al. disclose dual chamber dispenser having a duckbill valve. The duckbill valve is suitable as a metering valve and has closable valves giving the option of different flow rates for each disclosed component (col. 2, lines 46-54). The valves may also have an anti-suck back functionality, which restricts air from entering the tube after each extrusion stroke (col. 3, lines 30-35). The reference differs from the instant

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claims insofar as it does not disclose the compositions that are stored in the dispensers are skin compositions comprising a reactive agent, anionic surfactant and stabilizer.

It would have been obvious to one of ordinary skill in the art to have used the dispensers to store the compositions of the primary reference motivated by the desire to keep the two components separate and to be able to deliver different amounts of each component to the targeted site when necessary or to control the delivery of each component when the components have different flow rates, as disclosed by the secondary reference.

3) Claims 5-6 and 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lentini et al. (US 6,177,092) in view of Hall et al. (US 5,316,054).

The primary reference is discussed above. The reference differs from the instant claims insofar as it does not disclose the type of cap used on the dispensers.

Hall et al. disclose container caps that have markings for measuring compositions inside a container. The primary objective of the caps is to enable quick and easy dosing of a highly concentrated liquid that is diluted with water by a certain ratio (col. 3, lines 19-23). A fill line is provided for the user in order for the correct amount of water to be added to the concentrated liquid. The cap also comprises a reservoir for the concentrated liquid so the correct amount of liquid is used (see Abstract). The reference differs from the instant claims insofar as it does not disclose the type of composition used.

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It would have been obvious to one of ordinary skill in the art to have used the caps when dispensing or storing the compositions of the primary reference motivated by the desire to deliver the desired amount of each component to the targeted site by being able to measure the amount of the two components when mixing, as disclosed by the secondary reference.

### **Obvious-Type Double Patenting**

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-15 and 18 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-1, 13, and 16-17 of copending Application No. 10/730,218 in view of Lentini et al. (US 6,177,092). The copending claims are not identical but are coextensive insofar as they both recite a

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two component composition where the two parts are kept separate before being used. The instant claims recite a packaged product whereas the copending claims recite the compositions themselves and are narrower in scope in regards to the components in the compositions. Lentini et al. disclose two component compositions that are packaged in bottles having dual chambers for storage. The two components are kept separate before use and are dispensed from physically separate packages or from a unitary package with chambers.

It would have been obvious to one of ordinary skill in the art to have used a dual chamber bottle to package the compositions of the copending application motivated by the desire to store the compositions and keep the two components from reacting with one another before use, as disclosed by the secondary reference.

This is a provisional obviousness-type double patenting rejection.

Claims 1-15 and 18 are rejected.

Claims 16 and 19-20 are withdrawn.

No claims allowed.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lezah W. Roberts whose telephone number is 571-272-1071. The examiner can normally be reached on 8:30 - 5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Ardin H. Marschel can be reached on 571-272-0718. The fax phone

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number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Lezah Roberts  
Patent Examiner  
Art Unit 1614



Frederick Krass  
Primary Examiner  
Art Unit 1614

